IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 3RD OCTOBER 2006 / 11TH ASWINA 1928

RSA.No. 144 of 2006()

AS.82/2000 of ADDL.DISTRICT & SESSIONS JUDGE, FAST TRACK COURT (ADHOC II) , KOTTAYAM
OS.218/1998 of MUNSIFF COURT, KANJIRAPPALLY

.....

: APPELLANT/DEFENDANT:

JOSEPH JOSEPH, S/O. JOSEPH,
MARATTIL, KORUTHODU, ERUMELI NORTH VILLAGE,
KANJIRAPPALLY TALUK.

BY ADV. SRI.RAJEEV V.KURUP

RESPONDENTS:RESPONDENTS/ PLAINTIFFS:

---

1. KURIAKOSE MATHEW, S/O. KURIAKOSE,
KATHAMBAYIL,KORUTHODU, ERUMELI NORTH VILLAGE,
KANJIRAPALLY.

2. JOSEPH MATHEW, S/O. JOSEPH,
PAREMACKAL OF DO. DO.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 03/10/2007, THE COURT ON 03/10/2006 PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

==========

R.S.A. NO. 144 OF 2006

==========

Dated this the 3rd day of October, 2007

JUDGMENT

Defendant in O.S.218/1998 on the file of Munsiff Court, Kanjirappally is the appellant. Plaintiffs are the respondents. Respondents instituted the suit for realisation of the amount due under Ext.A1 agreement dated 24.4.1997 whereunder appellant had agreed to repay Rs.40,000/- due to the respondents. It was contended that inspite of notice demanding the amount, appellant did not pay the amount and therefore he is entitled to realise the same with interest and costs. Appellant resisted the suit contending that he did not purchase 29.65 cents in survey No.401/17 of Block No.30 of Erumeli North Village and appellant did not borrow Rs.40,000/- on 24.4.1997 and hence he is not liable to pay the amount. It was contended that respondents are real estate brokers and they approached appellant and

informed that the property of Lekshmanan situated in Koruthodu can be mutually exchanged and appellant has to pay an additional sale consideration of Rs.10,000/-. Believing the words of respondents that they will dispose the property at a higher price Ext.A1 agreement was executed. But the property was not sold as promised. Hence Lekshmanan was permitted to dispose of the property due to financial crisis of the appellant. Accordingly property sold under sale deed dated 25.5.1998 and therefore respondents are not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 and 2, Dws. 1 and 2 and Exts.A1 and B1 granted a decree directing appellant to pay Rs.40,000/- without interest and cost. Appellant challenged the decree and judgment before District Court, Kottayam in A.S.82/2000. Learned Additional District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. Before the first appellate court appellant had produced the lawyer notice sent at the instance of respondents and the reply sent

by appellant to receive them as additional evidence. First appellate court received them as additional evidence and marked them as Exts.B2 to B5. Aggrieved by the dismissal of the appeal, second appeal is filed.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel is that eventhough Ext.B2 to B5 were marked as additional evidence, they were not considered by the first appellate court and evidence was not appreciated properly either by the trial court or by first appellate court. It was argued that under Ext.A1 agreement appellant had agreed to pay the amount only if respondents sold the property at a higher price and as the property was not sold by respondents, and instead property was sold by Lekshmanan subsequently, appellant is not liable to pay any brokerage to respondents and hence courts below should not have granted the decree sought for by respondents.

5. On hearing the learned counsel, I do not find any substantial question of law involved in

the appeal.

6. Ext.A1 is an agreement admittedly executed by appellant on 24.4.1997. Even when examined as DW1, appellant admitted that he executed Ext.A1 understanding the contents therein. Ext.A1 does not contain a provision that Rs.40,000/- is to be paid by appellant to respondents, if respondents sell the property at a higher price as canvassed by appellant at the time of evidence. Though as DW1 it was deposed by appellant that the agreement was that respondents will sell the property, which was agreed to be exchanged with Lekshmanan, for a consideration of Rs.3 lakhs and in that case alone Rs.40,000/- is to be paid to the respondents and as respondents did not sell the property and it later sold by Lekshmanan himself, appellant is not liable to pay any amount, as rightly found by courts below, such a contention was not pleaded in the written statement. Therefore courts below were not prepared to accept the case set up by appellant as DW1 especially when it is admitted that he executed Ext.A1 after understanding the contents therein and Ext.A1 does not support the case

advanced. Courts below on appreciation of evidence of respondents as well as that of the appellant found that the transaction is not as claimed by appellant but as reflected in Ext.A1 and deposed by respondents. Though argument of learned counsel is that first appellate court did not appreciate Exts.B2 and B5 lawyer notice and the reply notice sent by the appellant, even if the lawyer notice and the reply notice are appreciated, it will not affect the finding rendered by the courts below. In such circumstance, as no substantial question of law involved in the appeal, it is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006